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Keena v Ireland and the Protection of Journalistic Sources

Ronan Ó Fathaigh*

In two decades of jurisprudence since *Goodwin v UK* on the protection of journalistic sources, the European Court of Human Rights has usually been called upon to consider two issues, namely: court orders compelling journalists to reveal a source or a source's document; or police seizure of journalistic material to identify a source or a source's document. However, *Keena and Kennedy v Ireland* presented two novel issues for the Court: first, what is the consequence of a journalist not only refusing to surrender a document from a confidential source, but going one step further, and destroying the document, before a court has an opportunity to consider the issue. Second, may domestic courts impose the full costs of legal proceedings on journalists where they destroy a document in such circumstances. The Court held, by a majority, that not only was destroying the document not a 'legitimate' exercise of the right to protection of journalistic source, but imposing costs was 'a matter for the discretion of the domestic courts'. This article offers a critical discussion of *Keena and Kennedy*, and argues that the Court's reasoning is open to question on both points.

Introduction

In 2001, when the High Court in London ordered the *Financial Times* to surrender a confidential document it had received from an anonymous source, the newspaper refused to do so.¹ When the Court of Appeal made a similar order, the newspaper again refused.² But eight years later, the newspaper's stance was finally vindicated, when the European Court of Human Rights unanimously held that the order against the *FT* violated its right to freedom of expression under Article 10 of the European Convention of Human Rights.³ The European Court also ordered the UK government to pay costs to the newspaper for having had to defend the proceedings in the domestic courts.⁴

In 2006, something similar happened to *The Irish Times*, when a Tribunal of Inquiry ordered the newspaper's editor to surrender a confidential document it had received from an anonymous source. In this case, however, not only did the newspaper refuse to obey the Tribunal's order, the newspaper's editor decided to go one step further, and destroyed the document in question. With the document destroyed, the High Court in Dublin ordered the editor to appear before the Tribunal and answer all questions about the document's source.⁵ However the Supreme Court stepped in, and set aside the High Court's order, holding that the order failed the test laid down by the European Court of Human Rights that there must be an 'overriding requirement in the public interest' before compelling journalists to answer such questions.⁶

However, four months later, the Supreme Court handed down a two-page ruling on who should pay the Tribunal's costs in seeking the order, and who should pay the newspaper's costs in having to defend itself. In a unanimous ruling, the Supreme Court held that not only should the *Times* pay its own costs, but the newspaper should also pay the Tribunal's costs.⁷ The newspaper's 'reprehensible conduct' in destroying the document 'was such as to deprive them of their normal expectation' of a costs award in

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¹ *Interbrew v Financial Times & Ors* [2001] EWHC 480 (Ch).

² *Financial Times Ltd & Ors v Interbrew SA* [2002] EWCA Civ 274.

³ *Financial Times Ltd and others v UK* (2010) EHRR 46.

⁴ *ibid*, para 96.

⁵ *Judge Mahon v Keena & anor* [2007] IEHC 348 (Irish Digests)

⁶ *Mahon Tribunal v Keena and Kennedy* [2010] 1 IR 336. For commentary, see Aisling McMahon, 'Journalists' Privilege in Light of *Mahon v. Keena*' (2010) 28 Irish Law Times (ns) 90, and Eoin Carolan, 'The Implication of Media Fragmentation and Contemporary Democratic Discourse for 'Journalistic Privilege' and Protection of Sources' (2013) 48 Irish Jurist (ns) 138.

⁷ *ibid* 366.

their favour.⁸ The Tribunal served the newspaper with a bill of nearly €400,000. The newspaper's editor described the costs ruling as in effect amounting 'to a penalty'.⁹ And as such, the newspaper decided to make an application to the European Court claiming a violation of Article 10.

The European Court issued its admissibility decision recently, and 'by a majority', held that the Supreme Court's ruling on costs did not violate the European Convention's guarantee of freedom of expression.¹⁰ Given that the Court in its admissibility decisions does not disclose the votes of individual judges, nor publish separate opinions,¹¹ the purpose of this article is to explore the soundness of the Court's decision, and whether there are any possible weaknesses in its reasoning (as we know at least one judge voted to find the application admissible).

The Anonymous Leak

In mid-September 2006, the *Times* published a front-page story detailing how the Tribunal of Inquiry into Certain Planning Matters and Payments had written to a named businessman, seeking information on possible payments made to then Taoiseach Bertie Ahern. The article was written by *Times* journalist Colm Keena, and had been based on a leaked Tribunal letter Keena had received anonymously two days earlier.

Hours after the article had been published, the Tribunal wrote to the newspaper's then-editor Geraldine Kennedy, to 'express its concern' that the newspaper had relied upon confidential Tribunal material, and Kennedy confirmed to the Tribunal that the article had been based on a Tribunal letter it had received from an anonymous source. Three days later, the Tribunal issued an order requiring the newspaper to hand over the Tribunal's correspondence. However, Kennedy informed the Tribunal the same day that the correspondence 'had been destroyed', and 'disputed the right of Tribunal' to make such as an order.

The Tribunal then summoned Keena and Kennedy to appear before it, and produce any copies of the Tribunal's correspondence, and answer all questions about the source. The journalists appeared before the Tribunal, but refused to answer any questions 'which they considered might lead to the identification of the source of the leak of confidential information'.¹² The Tribunal issued a ruling, holding that the applicants were in breach of the Tribunal's order, and although it had no power to sanction the journalists, it would apply to the High Court 'to compel the applicants to comply with its orders'.¹³

High Court and Supreme Court Judgments

The High Court ruled that the Tribunal had the 'necessary legal power' to summon the journalists to answer questions put to them about the leaked document,¹⁴ and then went on to consider whether such an order could be made in light of the journalists' privilege against disclosure of their sources. The Court held that this journalistic privilege was 'overwhelmingly outweighed' by the need to 'preserve public confidence in the Tribunal'.¹⁵ Moreover, 'only the slightest of weight' should be attached to journalistic privilege when it involved 'anonymous communication'.¹⁶ And crucially, the High Court stated that the 'destruction of these documents' was a relevant consideration to which 'great weight' must be given.¹⁷

⁸ *ibid* 368.

⁹ Paul Cullen, 'Paper considering European appeal, says Kennedy' *The Irish Times* (Dublin, 27 November 2009).

¹⁰ *Keena and Kennedy v Ireland* App no 29804/10 (ECtHR, 30 September 2014).

¹¹ European Convention on Human Rights and Fundamental Freedoms, art 45 ('If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.' There is no mention of such an entitlement for 'decisions').

¹² *Keena v Ireland* (n 10), para 11.

¹³ *ibid*.

¹⁴ *Judge Mahon v Keena* (n 5) 357.

¹⁵ *ibid* 368.

¹⁶ *ibid* 367.

¹⁷ *ibid*.

The journalists appealed to the Supreme Court, which delivered a unanimous judgment in July 2009, overturning the High Court judgment.¹⁸ The Supreme Court agreed with the High Court's assessment that the journalists had engaged in 'reprehensible conduct' in destroying the documents,¹⁹ but held that the High Court had erred in attaching 'great weight' to this consideration.²⁰ Moreover, given that the source was anonymous, and the documents 'no longer exist',²¹ the Supreme Court considered that the benefit to the Tribunal in asking the journalists about the source was 'speculative at best'.²² Thus, the Tribunal's order failed the test under *Goodwin v UK*, that journalists can only be compelled to answer questions about their sources if justified by an 'overriding requirement in the public interest'.²³

However, four months later, the Supreme Court issued a two-page ruling on costs,²⁴ and held that the journalists were to pay the Tribunal's legal costs, then totalling €393,000 (not including the newspaper's own costs).²⁵ The Court held that although the winning party will usually have their costs paid, this principle may be departed from in 'exceptional cases'.²⁶ The 'reprehensible conduct' of the journalists in destroying the documents 'determined' the outcome of the case, and 'was such as to deprive them of their normal expectation' of a costs award in their favour.²⁷ The Tribunal was 'fully entitled' to seek the assistance of the High Court, and consequently, the journalists were to pay for the Tribunal's costs.²⁸

The *Times* in Strasbourg

The journalists then made an application to the European Court, claiming the Supreme Court's costs ruling violated Article 10 of the European Convention. They argued that the proceedings taken by the Tribunal were 'misconceived from the outset', and they had been 'penalised' by the Supreme Court for protecting their source; the Supreme Court's view that the document's destruction had prevented the courts from examining the case was 'mistaken', as the Supreme Court was still able to reach a decision on the Tribunal's order; the costs ruling would have a chilling effect on the press as journalists could now be compelled, 'under threat of an order of costs', to disclose their sources; and the rules²⁹ on costs were 'so vague' as to allow 'arbitrariness'.

However, in an eight-paragraph decision, the Court rejected Keena and Kennedy's claims, and held that there had not even been an 'interference' with their Article 10 right to freedom of expression. First, the Court dismissed the claim that the Tribunal's attempt to discover the source was 'inherently misconceived' or a 'direct threat' to the right to protection of journalistic sources, which 'justified' destroying the document. The Court held that the Tribunal's interest in discovering the source was not 'necessarily devoid of merit'. The issue of balancing the competing interests was for the domestic courts, and would have been able to do so 'had the applicants not destroyed the documents'. It followed, according to the Court, that destroying the documents was not a 'legitimate exercise' of their Article 10 right to protect their sources.³⁰

Moreover, the Court rejected the argument that even though the leaked document had been destroyed, the Irish courts were still able to rule on the case. The Court said that this was 'to misconstrue the Supreme Court's decision', as the journalists had 'presented to the Tribunal' and the courts a '*fait*

¹⁸ *Mahon Tribunal v Keena* (n 6).

¹⁹ *ibid* para 94.

²⁰ *ibid* para 99.

²¹ *ibid* para 94.

²² *ibid* para 98.

²³ *ibid* para 100, citing *Goodwin v UK* (1996) 22 EHRR 123, para 39.

²⁴ *Mahon Tribunal v Keena* (n 6) 366-368.

²⁵ *Keena v Ireland* (n 10), para 28.

²⁶ *Mahon Tribunal v Keena* (n 6) 368.

²⁷ *ibid*.

²⁸ *ibid*. For commentary, see Eoin O'Dell, 'The *Irish Times* should appeal the costs order to the ECHR - Part I' (*Cearta.ie*, 7 December 2009) <<http://www.cearta.ie/2009/12/the-irish-times-should-appeal-costs-order-to-echr>> accessed 15 December 2016, and Eoin O'Dell, 'The *Irish Times* should appeal the costs order to the ECHR - Part II' (*Cearta.ie*, 8 December 2009) <<http://www.cearta.ie/2009/12/the-irish-times-should-appeal-the-costs-order-to-the-echr-part-ii>> accessed 15 December 2016.

²⁹ RSC Ord 99.

³⁰ *Keena v Ireland* (n 10), para 48.

accomplish, and 'undermined the judiciary'.³¹ The Court agreed with the Irish Supreme Court that the destruction of the documents had 'deprived the courts of any power to give effect to any order of the Tribunal'.³²

Finally, the Court rejected the argument that the costs order would have a chilling effect on free expression because (a) as a 'general principle' costs are a matter for the 'discretion' of domestic courts,³³ and (b) the costs order would have 'no impact' on 'public interest journalists' who respect the rule of law, or compel disclosure of sources.³⁴ For the European Court, the ruling 'simply signified' that nobody may 'usurp the judicial function'.³⁵ It followed that the application was 'manifestly ill-founded', and inadmissible.

'By a majority'

As with all admissibility decisions, while we know the Court's decision was 'by a majority', the Court does not disclose the votes of individual judges, nor publish separate opinions. However, the majority vote suggests that there was division within court, and confirms that issue was not clear-cut. Therefore, it is important to explore whether there are any weaknesses in the Court's reasoning. In this regard, an arguably crucial holding was that Keena and Kennedy's destruction of the document was not a 'legitimate exercise' of their right to protect their source, and the costs ruling was thus not an 'interference' with Article 10. This meant the Court did not have to apply its usual Article 10 review i.e. whether the costs rules were 'prescribed by law', whether the costs ruling 'pursued a legitimate aim', and whether imposing all costs on the newspaper was 'necessary in a democratic society'.

But it can be argued that the Court overlooked a crucial step in its reasoning, by being too quick in focusing on the destruction of the document. It is important to note that the journalists destroyed the document only *after* the Tribunal had ordered them to surrender the document. The destruction only becomes relevant once the Tribunal had issued its order (if the Tribunal had not issued its order, the journalists could have done what they liked with the document).

Therefore, the Court's first consideration should arguably have been whether the order from the Tribunal was an 'interference' with the right to protection of journalistic sources.³⁶ It is indisputable that the *Times* article was an exercise of free expression, concerning a matter of public interest, and as the article was based upon on an anonymous source's document, this meant the Article 10 right to protection of sources applied.³⁷ It follows that the Tribunal's order was an 'interference' with the right to protection of sources. Given that the Supreme Court's costs ruling would not have been issued had the Tribunal not made an order against the journalists, it similarly follows that the costs ruling was an 'interference' with Article 10 which flowed from the order being issued. Importantly, this was *not* a contempt of court case, and the 'behaviour' of the journalists only becomes relevant when examining the justification and proportionality of the costs ruling.

At least one judge (or possibly three) on the Court voted that Keena and Kennedy's application should be admissible under Article 10, and suggests there was support within the Court for the view that there had been an 'interference' with Article 10. Had the Court declared the application admissible, the question arises as to how might the Court have applied its usual Article 10 review?

The first limb of Article 10 review is whether the interference is 'prescribed by law', and there is indeed a strong argument that the cost rules are vulnerable under this limb. The rules merely provide that costs for proceedings in the Irish superior courts 'shall be in the discretion of those Courts', and that costs

³¹ *ibid*, para 49.

³² *ibid*.

³³ *ibid*, para 50.

³⁴ *ibid*.

³⁵ *ibid*.

³⁶ A unanimous Grand Chamber has held the protection of journalistic sources is a 'right' under Article 10 (*Sanoma Uitgevers BV v the Netherlands* [2011] EMLR 4, paras 67 and 88).

³⁷ Curiously, the Court in *Keena* fails to apply, or even cite, *Financial Times* (n 3) concerning anonymous sources, a case directly on point.

should 'unless otherwise ordered, follow the event'.³⁸ Importantly, in 2010 the 17-judge Grand Chamber of the European Court delivered its landmark opinion in *Sanoma v the Netherlands*,³⁹ setting out the principles applicable under this limb in relation to source protection: an interference must (a) have some basis in domestic law, (b) be adequately accessible and foreseeable, (c) afford a measure of legal protection against arbitrary interferences, and (d) 'indicate with sufficient clarity the scope' of any discretion and the 'manner of its exercise'.⁴⁰ It is difficult to see how the cost rules satisfy this test, in particular (c) and (d), given that the Supreme Court itself admitted that 'there has been no fixed rule or principle determining the ambit of the exercise of the court's discretion'.⁴¹

The second limb is whether the costs ruling 'pursued a legitimate aim'. The Supreme Court mentioned two reasons why the journalists should pay both their own costs and the Tribunal's costs: 'the behaviour of the appellants' and the Tribunal being 'fully entitled to conduct its inquiry and seek the assistance of the High Court'.⁴² It is difficult to see how the first reason comes with the legitimate aims mentioned in Article 10,⁴³ however, the second reason would arguably come within the 'protect the rights of others', or 'preventing the disclosure of information received in confidence' clauses.

The final, and most exacting limb, is whether the interference was 'necessary in a democratic society'. It is important to point out that the Supreme Court arguably had at least three options open to it: (a) require the Tribunal to pay its own costs, as well as the newspaper's costs; (b) require the Tribunal to pay its own costs, and the newspaper to pay its own costs; or (c) require the newspaper to pay its own costs, as well as the Tribunal's costs. Option (a) is the most favourable to the newspaper; option (b) would split the costs; and option (c) is the most detrimental to the newspaper, and is arguably punitive in nature.

The Supreme Court chose option (c). The question is thus what standard of scrutiny the European Court should apply in reviewing whether the Supreme Court's choice was 'necessary in a democratic society'. Notably the Court in *Keena* engaged with this argument (even though it held the application was inadmissible), and in rejecting the journalists' argument that the costs ruling would have a chilling effect on freedom of expression, the Court held that as a 'general principle' costs are a matter 'for the discretion' of domestic courts, citing *Christodoulou v Cyprus*⁴⁴ as the sole authority for this proposition.⁴⁵

But this reliance on *Christodoulou* for such a deferential review is quite questionable: first, it is arguable that *Christodoulou* is inapplicable, as it involved the Article 6 right to a fair trial, and whether a costs order following a successful challenge to a rent decision was 'fair'. However, more importantly, *Christodoulou* is arguably not controlling, when we consider two Article 10 cases the Court in *Keena* fails to apply, and actually concern the press and costs rulings: in *MGN v UK* the Court applied its highest level of scrutiny, the 'most careful scrutiny' test,⁴⁶ when deciding whether a costs order against a newspaper violated Article 10, and totally rejected any sort of *Christodoulou*-type deference to domestic courts. Similarly, in *Kasabova v Bulgaria*, the Court again applied its 'most careful scrutiny' test to a costs order imposed on a journalist.⁴⁷ Both *MGN* and *Kasabova* were unanimous opinions, delivered after *Christodoulou*, neither mention *Christodoulou*, and indeed, it would appear that *Christodoulou* has never even been applied in an Article 10 case before *Keena*.

Not only would *MGN* and *Kasabova* point to an application of the 'most careful scrutiny' test, but importantly, in the Grand Chamber's *Sanoma* opinion, the Court ruled that not only must there be an

³⁸ RSC Ord 99.

³⁹ *Sanoma* (n 34).

⁴⁰ *ibid*, paras 81-82.

⁴¹ *Mahon Tribunal v Keena* (n 6), quoting *Dunne v Minister for the Environment* [2008] IR 775, 780.

⁴² *ibid* 368 (para 12 *per* Murray CJ).

⁴³ European Convention (n 11), art 10 (2) ('interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary').

⁴⁴ *Christodoulou v Cyprus* App no 30282/06 (ECtHR, 16 July 2009).

⁴⁵ *Keena and Kennedy* (n 10), para 50.

⁴⁶ *MGN Limited v UK* (2011) 53 EHRR 5, para 201.

⁴⁷ *Kasabova v Bulgaria* App no 22385/03 (ECtHR, 19 April 2011), para 55.

'overriding requirement in the public interest' for a source-disclosure order, but also for any other 'interference' with the right to protection of sources.⁴⁸ Therefore, on the authority of *Kasabova*, *MGN* and *Sanoma*, any costs ruling imposed on journalists for protecting their source (a) must satisfy the 'most careful scrutiny' test, and (b) there must be an 'overriding requirement in the public interest' for imposing costs. Moreover, in relation to anonymous sources, the Court has held in *Financial Times v UK* that these principles apply equally to the protection of such sources, as 'a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources'.⁴⁹

Applying this exacting standard of review, a number of factors must be considered: first, the Supreme Court arguably chose the most punitive costs ruling, which included requiring the newspaper to pay the Tribunal's costs; second, the newspaper was required to pay the Tribunal's costs in both the High Court and Supreme Court, even though the Supreme Court found the High Court had erred; and, third, although the journalists did destroy the document, importantly the High Court and Supreme Court proceedings were *not* contempt of court proceedings, with the sole purpose of these proceedings being to force the journalists to answer questions about their source. All of these considerations would seem to point towards the Supreme Court's costs ruling being disproportionate, as a less restrictive measure would have been only requiring the newspaper to pay its own costs, not the Tribunal's.

Further, it is difficult to see how the reasons given by the Supreme Court for imposing costs satisfy an 'overriding requirement in the public interest'. The two reasons given by the Supreme Court were 'the behaviour of the appellants' and the Tribunal being 'fully entitled to conduct its inquiry and seek the assistance of the High Court'. However, neither of these reasons would seem to satisfy this test when we consider the stronger interests the Court has rejected in the past as not outweighing the right to protection of sources, such as an intelligence service's interest in removing a leaked document from public circulation,⁵⁰ a government's interest in 'the prevention of disorder or crime' by prosecuting public officials who had leaked documents to the press,⁵¹ or a government's interest in the 'prevention of disorder or crime' by prosecuting public officials for possible bribery following leaks to the press.⁵² The only interest the Tribunal had in seeking the order was to 'preserve public confidence in the Tribunal', but notably, in *Voskuil v the Netherlands*, the Court explicitly held that the Dutch government's interest in protecting the 'integrity of the police and judiciary' was not 'sufficient' to outweigh the right to protection of sources.⁵³

Conclusion

Following the European Court's decision, the *Times* published an article by Kennedy, where she explained her decision to have the documents destroyed.⁵⁴ She wrote that the 'decision to destroy documents' was 'informed' by the experience of *The Guardian* in 1983,⁵⁵ when the newspaper was forced to hand over a leaked document it had received anonymously, and a 24-year-old office clerk from the Ministry of Defence would later be jailed for the leak. Kennedy argued that because all of the Tribunal's correspondence had distinguishing security codes, 'if the documents were handed over there was no guarantee we could protect sources'.⁵⁶ Destroying the documents had therefore been necessary.

Kennedy's reasoning is particularly revealing: it arguably shows how little faith the press had in the courts not to order the surrender of documents; and also how the press worried about the *Guardian's* experience back in 1983, even though the European Court handed down its landmark *Goodwin* opinion on source-protection in 1996. However, this may be partly explained by the lack of judgment from the Irish courts confirming the existence of a 'right to protection of journalistic sources'. Thus, it is worth

⁴⁸ *Sanoma* (n 34), para 51.

⁴⁹ *Financial Times* (n 3), para 58 and 97.

⁵⁰ *Telegraaf Media Nederland Landelijke Media BV and others v the Netherlands* (2012) 34 BHRC 193, para 131.

⁵¹ *Roemen and Schmit v Luxembourg* App no 51772/99 (ECtHR, 25 February 2003), para 58.

⁵² *Tillack v Belgium* (2012) 55 EHRR 25, para 67.

⁵³ *Voskuil v the Netherlands* (2010) 50 EHRR 9, paras 66 and 72.

⁵⁴ Geraldine Kennedy, 'A cold, calculated decision to step outside the law' *The Irish Times* (Dublin, 25 October 2014).

⁵⁵ *ibid.*

⁵⁶ *ibid.*

reiterating that the 17-Grand Chamber of the European Court has declared that protection of sources is not merely an 'interest' protected by Article 10, but a full-blown 'right', which may only be restricted in extremely limited circumstances. Importantly, in the two decades since *Goodwin* was delivered, the European Court has on only one occasion found an order to surrender journalistic material consistent with Article 10 (in a case involving a paedophile).⁵⁷

Finally, it is a real pity the *Financial Times* judgment would only be handed down in 2009, three years after Kennedy decided to destroy the documents. Had *Financial Times* been decided in 2006, it would have been clear that the right to protection of sources includes anonymous sources, and it is arguable that the Irish High Court could never have declared that 'only the slightest of weight' should be attached to journalistic privilege involving anonymous sources.⁵⁸ The experience of the *FT* might also have signalled to Kennedy and Keena that the courts would protect their anonymous source, and there was no need to 'step out the law'.⁵⁹ Instead, we are left with the *Keena* decision, and a newspaper with a large legal bill.

⁵⁷ *Nordisk Film & TV A/S v Denmark* App no 40485/02 (ECtHR, 8 December 2005).

⁵⁸ *Judge Mahon v Keena* (n 5) 367.

⁵⁹ *Kennedy* (n 54).